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Supreme Court, U.S.
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No.92-471

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

MALONE SERVICE COMPANY,
ARTHUR MALONE, and LARRY MALONE,
Petitioners,

V.

THE STATE OF TEXAS,
Respondent.

On Petition For Writ of Certiorari To
The Supreme Court of Texas

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether this Court has jurisdiction to review the actual decision of the Texas Supreme Court, since that decision did not involve a substantial federal question, and/or rested upon adequate, independent state law bases?

(The respondent, the State of Texas, contends that the first two of petitioners' Questions Presented are not in fact presented by the challenged Texas Supreme Court decision or the record. As to petitioners' third Question Presented, respondent argues that it, too, mischaracterizes the Texas Supreme Court decision, which in fact turned on a routine [and correct] application of Texas evidentiary rules. The Texas Supreme Court decision did not involve a substantial federal question and/or rested upon independent and adequate state law grounds.)

LIST OF PARTIES

Petitioners, Malone Service Company, Arthur Malone, and Larry Malone, were defendants in the state trial court, appellants in the Court of Appeals for the Fourteenth Supreme Judicial District of Texas, and respondents in the Supreme Court of Texas.

Respondent, the State of Texas, was the plaintiff in the state trial court, appellee in the Court of Appeals for the Fourteenth Supreme Judicial District of Texas, and petitioner in the Supreme Court of Texas.

ABBREVIATIONS USED

DX -	Defendants' Exhibit
SF -	Statement of Facts (i.e., court reporter's transcript of trial testimony and jury argument)

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THE STATE OF TEXAS,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, the State of Texas, hereby submits its brief in opposition to the petition for a writ of certiorari, which seeks review of the decision of the Texas Supreme Court in this case.

OPINION BELOW

The respondent, the State of Texas, emphasizes that petitioners ask for the writ of certiorari to review a decision of the Texas Supreme Court, not of Texas's Fourteenth Court of Appeals. The latter court, an intermediate appellate court, deemed other violators' civil penalties to be persuasive evidence relevant to discriminatory enforcement. The Texas Supreme Court reversed the Fourteenth Court of Appeals on the admissibility of the evidence. The reversal -- which respondent argues rested on state law grounds -- is what petitioners challenge.

JURISDICTION

The respondent does not challenge petitioners' statements about the timeliness of their filings, but, as mentioned above in the Question Presented section of this brief and as discussed more fully below, the respondent urges that under 28 U.S.C. §1257 the Court lacks jurisdiction to review the Texas Supreme Court decision challenged.

CONSTITUTIONAL PROVISIONS APPLICABLE

The respondent contends that the Equal Protection clause of the United States Constitution is not applicable, inasmuch as the Texas Supreme Court opinion challenged by petitioners turned on state law, including Texas evidentiary principles, and not on an interpretation of the Constitution.

STATEMENT OF THE CASE

This is a civil environmental enforcement suit initiated by the respondent at the request of the Texas Water Commission in January 1986 in Texas state court for unauthorized dumping of hazardous waste sludge in an earthen pit and for contamination of groundwater near the pit. The suit was against Malone Service Company, which was the commercial hazardous waste disposal company owning and operating the pit, its president, Arthur Malone, and its plant manager, Larry Malone.[1] Malone Service Company, Arthur Malone, and Larry Malone are petitioners in this Court.

The respondent won a civil penalty jury verdict in April 1989 and was granted judgment totaling $3,052.900. The petitioners alleged discriminatory enforcement as a defense but the jury rejected it.

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[1] Also sued were the company's founder, the company's financial director, the president of a related trucking company, and a parent company. The trial judge directed a verdict in favor of these defendants and the respondent took no cross-appeal.

Petitioner did not make the usual claim of being singled out because of membership in an illegally disfavored class or in retaliation for attempted exercise of constitutional rights. Their theory has changed through the years. In summation to the jury at trial their attorney seemed to argue that respondent intentionally favored big companies and persecuted small companies like petitioner Malone Service Company,[2] while also mentioning alleged non-enforcement against the Gulf Coast Waste Disposal Authority six times.[3]

In framing their appeal to the Fourteenth Court of Appeals, they shifted emphasis, hypothesizing the existence of a class consisting of the Gulf Coast Waste Disposal Authority and its customers and "investors." That class, petitioners contended on appeal, had not been enforced against with sufficient vigor. The petitioners portrayed themselves as a class consisting of one member. Apparently trying to show that respondent had an improper motive to favor the Gulf Coast Waste Disposal Authority class over themselves, the petitioners in their appellate briefing and oral argument vigorously urged that the Gulf Coast Waste Disposal Authority *was* "the State" and that the State was seeking financially to benefit the Gulf

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[2] The suit itself, very, very few of these suits have been filed, and I will go over them, and what you will see, Ladies and Gentlemen, is there's a pattern to the suits. Every now and again they run out, sue some little company: Jasper Creosote, Liberty Waste. You aren't going to find Dow Chemical. You aren't going to find Chevron, Monsanto, Amoco, Union Carbide . . . .

SF 1848 (argument by Mr. Eugene Wilshire, attorney for petitioners).

[3] See SF at 1835, 1836, 1847, 1853, 1856, and 1859. The Gulf Coast Waste Disposal Authority is a political subdivision of the State of Texas, created by the Texas Legislature and given power to develop and effectuate a regional water quality management program in three counties on the Texas Gulf Coast. See Acts, Texas Legislature, ch. 409, 1969 Tex. Gen. Laws 1336. Petitioners claimed that the Gulf Coast Waste Disposal Authority is a direct competitor of theirs. See SF at 1859.

Coast Waste Disposal Authority (and thus itself) by hurting the petitioners. *See, e.g.*, Brief For Appellants, Malone Service Company, Arthur Malone and Larry Malone in the Fourteenth Court of Appeals at 32, lines 6-7 (Gulf Coast Waste Disposal Authority was a "state-owned competitor"); *id.*, lines 12-14 ("pecuniary benefit to the State by favoring *its* customers and investors and simultaneously enabling *it* to shutdown *its* competitor")(emphasis added); *id.*, page 12, lines 20-22 ("direct financial relationship of the . . . polluters to the State via Gulf Coast"). *See also, e.g.*, Amended Response Brief of Respondents' Malone Service Company, Arthur Lee Malone and Larry Malone in the Texas Supreme Court at 4 ("State's action . . . was motivated by a desire to obtain economic benefits for Gulf Coast -- a State agency").

At the trial, the petitioners had offered into evidence a Texas Water Commission enforcement log, DX 45. Two of the many columns in the log showed the outcomes of enforcement, including amounts of civil monetary penalties assessed against or collected from other companies for violations of the Texas Water Commission's hazardous waste rules and permits. The log -- on the basis of which petitioners' trial counsel cross-examined a Texas Water Commission enforcement coordinator about alleged differential treatment of others, *see, e.g.*, SF at 317, 1720-28 -- was allowed into evidence, but the trial court forbade examination about other violators' penalties and required that all penalty information in the two columns be excised before the exhibit was shown to the jury. By Point of Error Number Four in their briefing to the Fourteenth Court of Appeals, petitioners complained of the redaction of the penalty information and complained of exclusion of ten other documents, which they contended showed the identities of the Gulf Coast Waste Disposal Authority's customers and investors.

The Fourteenth Court of Appeals reversed the trial court on the exclusion of evidence point of error. 804 S.W.2d 174 (1991). The Texas Supreme Court granted discretionary review. Its primary direct holding was as follows:

> We conclude that the trial court did not abuse its discretion in excluding the penalty amounts in the enforcement log. We reverse the judgment of the court of appeals and remand this cause to that court for consideration of points not yet reached.

State v. Malone Service Co., 829 S.W.2d 763, 767 (Tex. 1992).[4]

REASONS WHY THE WRIT SHOULD BE DENIED

1. This Court lacks jurisdiction to review the actual decision of the Texas Supreme Court, which is mischaracterized in petitioners' Questions Presented. The actual decision below did not involve a substantial federal question, and/or rested upon adequate, independent state law bases.

a. Discussion of petitioners' first and second Questions Presented.

According to petitioners, an issue before this Court is whether

> a defendant who claims that he was intentionally singled out for prosecution by the State as the result of an arbitrary or irrational classification must show that the State directly benefitted by the classification scheme.

Petition for Writ of Certiorari, p. 7. This framing of the issue, which respondent contends is inaccurate, is based on a sentence in the Texas Supreme Court opinion and an accompanying footnote. The sentence was: "Malone offered no evidence suggesting

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[4] The respondent contends that petitioners' Statement of Facts contains inaccuracies in addition to those discussed above or in the Reasons Why the Writ Should Be Denied section of this brief. To keep the main parts of this brief concise while abiding by Supreme Court Rule 15 and avoiding waiver, respondent has attached as Appendix A a further discussion of what it contends are petitioners' inaccurate statements.

that benefits to Gulf Coast would flow directly to the State." 829 S.W.2d at 767. The footnote said that under the Texas statute creating and empowering the Gulf Coast Waste Disposal Authority, the Authority receives and holds its own funds, none of which flow directly to the state. The Texas Supreme Court gave a citation to Texas law for this proposition. *Id.* n. 7.

On appeal the petitioners pinned their discriminatory enforcement hopes on a particular idea: that the state sought financially to benefit itself by aiding the Gulf Coast Waste Disposal Authority. See the references to the petitioners' appellate briefing in the third to last paragraph of the Statement of the Case Section of this brief. The statutory inability of the state to realize financial gain by helping the Gulf Coast Waste Disposal Authority naturally undermines the theory. The petitioners' characterization of the Texas Supreme Court decision -- as holding that "victims of discriminatory enforcement, that are not members of a suspect class, must further establish that the State directly benefitted by the classification scheme," *see* Petition at 9 -- involves a mistaken over-generalization.

The arguments at pages 7-10 of the petition, therefore, are misdirected. They set up a straw man, accusing the Texas Supreme Court of having held that direct benefit to the state must always be shown, then knock him down by arguing that any irrational classification in enforcement is unconstitutional, regardless of direct benefit to the state. But, again, the Texas Supreme Court said nothing so universal. It was writing only about this case and about the particular theory of improper discrimination relied upon by petitioners at the appellate level. The Texas Supreme Court did not hold or suggest anything about the United States Constitution that would run counter to the authorities cited on pages 7-10 of the petition. Its statement that no evidence was offered on benefits flowing to the state via the Gulf Coast Waste Disposal Authority was merely a commentary -- an accurate commentary -- on the petitioners' failure to offer evidence at trial supporting the narrow theory of improper motivation which they relied upon on appeal.

Petitioners' second Question Presented is whether a person claiming to be a victim of discriminatory enforcement by the state meets his burden of proof by showing intentional discrimination pursuant to an invidious, arbitrary or irrational classification scheme. This question incorrectly assumes a ground that was in controversy in the courts below: whether petitioners in fact demonstrated intentional discrimination. A person defending on the ground of discriminatory enforcement must prove two elements: first, that he has been singled out for enforcement while others similarly situated and committing the same acts have not been enforced against; and second, that the singling out was based on some impermissible criterion such as race, religion, or attempted exercise of constitutional rights. *See generally Yick Wo v. Hopkins*, 118 U.S. 356 (1886). The Texas Supreme Court indicated that the petitioners had in fact failed to offer any proof on the second necessary element of impermissible basis. 829 S.W.2d at 767.

Petitioners premise what appears to be their discussion of their second Question Presented (page 10-13 of the Petition) upon several incorrect statements. They write:

> the Supreme Court of Texas found that Petitioners presented evidence that the State had engaged in selective enforcement. Despite this conclusion, the Texas Supreme Court held that improper motivation is only established by showing a direct benefit to the State.

Petition at 11-12. Further, they write that

> both appellate courts below agreed that the excluded evidence offered by the petitioners was "persuasive" proof that the State's motivation in this case was to intentionally enforce the laws against Petitioners and in favor of Gulf Coast.

Petition at 12. Both the statements quoted above are misrepresentations of the Texas Supreme Court's opinion.

Addressing the discriminatory enforcement defense offered by the petitioners, the Texas Supreme Court in fact wrote that

> Malone sought to establish that the State had discriminated by taking strong enforcement action against Malone while taking little or no action against companies associated with the Gulf Coast Waste Disposal Authority. This assertion, *if true*, would tend to support the allegation that Malone had been singled out for prosecution. *It would not*, however, constitute a showing that the government has purposefully discriminated on the basis of impermissible consideration.

829 S.W.2d at 767 (emphasis added).

The Texas Supreme Court went on to emphasize that "the party asserting the defense of discriminatory enforcement must show a clear intentional discrimination in enforcement of the statute." *Id.* The Court then found that in this case the petitioners had failed to make the necessary showing, since they had failed to offer any evidence of an improper discriminatory purpose in the respondent's enforcement. *Id.* As discussed above, the Texas Supreme Court's mention of the absence of evidence demonstrating a direct benefit to the state from the enforcement action against the petitioners related to the particular narrow discriminatory enforcement theory presented on appeal. It was in no way a global requirement that direct benefit to the state must always be demonstrated in support of the discriminatory enforcement defense.

b. Discussion of petitioners' third Question Presented.

The third of petitioners' Questions Presented attacks a holding of the Texas Supreme Court which actually turned not on constitutional law but on a Texas rule of evidence concerning the balancing of probative value against other considerations, and on other state law evidentiary principles.

The petitioners on appeal in Texas courts complained of exclusion by the trial court of two groups of evidence: portions of documents that would have shown whether any penalties were secured in other Texas Water Commission enforcement suits or administrative penalty proceedings, and if so, how much or little; and documents supposedly showing the identities of customers and investors of the Gulf Coast Waste Disposal Authority.[5]

i. Discussion of the "customer/investor" documents.

As to the so-called "customer/investor" documents -- DX 79, 259-61, 274-76, and 283-85 -- the Fourteenth Court of Appeals appeared to regard them as admissible, assuming as fact a contention of the petitioners based at least in part upon those excluded documents. *See Malone Service Co. v. State*, 804 S.W.2d 174, 176 (Tex. App. 1991), reversed, *State v. Malone Service Co.*, 829 S.W.2d 763 (Tex. 1992). In reversing the Fourteenth Court of Appeals on petitioners' fourth point of error, the Texas Supreme Court in effect validated the trial court's handling of the documents. All were Gulf Coast Waste Disposal Authority business records. Nine of them (i.e., all but DX 79) were inadequately authenticated. The petitioners' sponsoring witness, a subpoenaed Gulf Coast Waste Disposal Authority employee, could not say what the documents indicated, SF at 1700, and the petitioners made no proper proposal to narrow the offer by deleting any of the masses of names and numbers in them.

As to DX 79, it was a set of minutes from a 1976 board of directors meeting of the Gulf Coast Waste Disposal Authority. Again it contained many words and the petitioners did not either make its meaning clear to the trial court through a witness or propose to delete irrelevant matter. It says nothing

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[5] The facts about the offer, objections, and trial court ruling concerning other people's penalties were contained in SF 378-80, TR 1089-97 and 1115-23, and in the parties' stipulation filed with the Fourteenth Court of Appeals about the offer and objections.

about investors of the Gulf Coast Waste Disposal Authority. It speaks of bond issues by that entity -- which is governmental and would not normally have investors in the usual sense -- to finance building of pollution control facilities for companies, including Shell Oil Company. Even if bond purchasers could be regarded as investors, nothing in the exhibit indicates who were the purchasers.

The respondent contends, therefore, that the Texas Supreme Court's treatment of the "customer/investor" documents was a correct application of the Texas law of evidence.[6]

ii. Discussion of other companies' penalties.

The Texas Supreme Court directly discussed DX 45, the redacted enforcement log. It wrote:

> Evidence will generally be relevant to the defense of discriminatory enforcement if it tends to show either that the government has singled the defendant out for prosecution or that the government has acted on the basis of impermissible considerations. *See* Tex.R.Evid.

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[6] Even if, contrary to the effect of the Texas Supreme Court's ruling, the documents were legally relevant, the Texas Supreme Court should be viewed as having appropriately followed the Texas harmless error rule. The identities of the Gulf Coast Waste Disposal Authority's customers and "investors" were among the things petitioners wished to prove through the documents. See Petition at 4. Six of the "customer/investors" most important to petitioners' argument, apparently, are listed in the chart at the top of page 5 of the Petition. Four of those companies had been mentioned in trial testimony as customers of the Gulf Coast Waste Disposal Authority. SF at 830-34. Any otherwise legitimate summation argument keyed to their links with the Gulf Coast Waste Disposal Authority was therefore available to petitioners at trial.

Similarly, the quasi-governmental status of the Gulf Coast Waste Disposal Authority was in evidence, see SF at 829-30, so any otherwise proper summation argument based on that status could have been made.

> 401. Even if the evidence is relevant, however, the trial court may exclude it if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay or needless presentation of cumulative evidence. Tex.R.Evid. 403.

829 S.W.2d at 767. A trial court ruling on the basis of Texas Rule of Civil Evidence 403 is reviewed on an abuse of discretion standard, just as the correlative federal rule of evidence is (also numbered Rule 403). *See, e.g., Central Texas Hardware, Inc. v. First City, Texas-Bryan N.A.*, 810 S.W.2d 234, 238 (Tex. App.--Houston [14th Dist.] 1991); *Wright v. Hartford Accident & Indem. Co.*, 580 F.2d 809, 810 (5th Cir. 1978)(trial court has wide discretion; appeals court will not reverse unless there was a clear abuse of discretion). When the Texas Supreme Court said in its conclusion, 829 S.W.2d at 767, that the trial court did not abuse its discretion in excluding the penalty amounts, it was relying on the Texas evidentiary rule, not on its view of the United States Constitution. Therefore, no federal question is presented by the Texas Supreme Court decision, and/or the decision rests upon an adequate, independent state law basis.

The respondent contends that the Texas Supreme Court conclusion, in addition to being grounded in state law, was correct. Other people's penalties have weak probative value, if any, on the issue of the enforcer's motivation. The outcomes of enforcement do not logically relate to motivation because the enforcing entity lacks a crucial measure of control over them. Outcomes depend in part on actual or potential consideration by either a judicial or administrative tribunal separate from the enforcing agency or division. Moreover, past results are unreliable guideposts for the future, because statutes setting penalty ranges may have changed, regulations may have changed, the enforcer's attitudes may have changed, and -- as with environmental concerns -- public attitudes may have changed in the direction of less tolerance for violations.

Every case deserves to be tried upon its own facts. A jury in a civil environmental enforcement case should not be allowed to hear what other juries have awarded, any more than a jury in a criminal case (when the jury decides the issue of punishment) should be told what other similar defendants have been assessed as punishment. The jury should set its own standard, guided only by the statutory civil penalty range and appropriate civil penalty considerations such as the need for deterrence and any mitigating factors. It should be required -- and given the privilege -- to make up its own mind, unaffected by the false guideposts of past "precedent."

The considerations of possible prejudice, confusion of the issues, misleading of the jury, and undue delay from introduction of other people's penalties in an environmental enforcement case are overwhelming. In the present case, the respondent would have had to "re-try" many past cases to explain the reasons for low amounts or zeros[7] in the columns in DX 45 giving penalty information. Opening up settlements with other companies would have legitimated evidence of the settlement negotiations between respondent and petitioners. Presentation of such evidence would have been time-consuming and disharmonious with a long tradition of trials.

CONCLUSION

For the reasons stated above, the Petition For Writ of Certiorari should be denied.

Respectfully submitted,

DAN MORALES
Attorney General of Texas

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[7] No evidence in the record establishes whether the "0.00" notations in the "penalties assessed" and "penalties collected" columns meant that final disposition had occurred without a penalty or simply that the case was still pending as of the date of the log.

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APPENDIX A

Respondent's Further Statement About Inaccuracies in Petitioners' Statement of the Case

The respondent contends that portions of petitioners' Statement of Facts other than those discussed in the text of this brief are inaccurate.

On page 3 of their Petition, petitioners write that Malone Service Company is a direct competitor of the Gulf Coast Waste Disposal Authority. Petitioners always have made this assertion, including at trial, but no finding of the court or jury established its truth or falsehood.

At the top of page 4 of their Petition petitioners write that "Gulf Coast has stated that it is within its purpose to own every waste treatment facility in its jurisdiction" and "the general manager for Gulf Coast stated that Gulf Coast had the authority to acquire Malone." These assertions need to be placed in their proper context. Jack Davis, the Gulf Coast Waste Disposal Authority's general manager, testified that the statute creating the Authority allowed it to acquire, build, own, and operate waste treatment facilities without limitation. He said that when he used the word "purpose" he was referring to the Authority's statutory authority rather than its intentions. *See* SF 1387.

On page 4 of their Petition, petitioners assert that the enforcement log in dispute -- DX 45 -- disclosed the amount of penalties assessed and collected against *similarly situated* companies. Respondent has consistently disputed this assertion. Its correctness or incorrectness has not been directly established by jury findings, but the portion of the verdict rejecting petitioners' discriminatory enforcement defense suggests the jury thought it was incorrect. Petitioners have never defined what "similarly situated" means.

Respondent takes issue with petitioners' statement on

page 4 of their Petition that DX1 was a "comparative analysis of polluters." That exhibit -- based on information available to the Texas Water Commission at the time it was compiled -- listed industrial sites where groundwater contamination was found in the Texas City area. It did not even purport to bear on whether the circumstances resulting in contamination violated Texas statutes, Texas Water Commission regulations, or Texas Water Commission permits. Nor did it bear on the seriousness of any such violations. The enforcement case against petitioners turned on what respondents contended -- and the jury seems to have agreed -- were serious violations of Texas Water Commission permits. The groundwater contamination aspect of the case was a sidelight, as shown by the fact that respondent asked the trial court only for the minimum civil penalty allowed by Texas law for each discharge into the groundwater found by the jury.

Finally, the respondent disputes the statement on page 5 of the Petition that "[t]he jury was not informed that no real enforcement was being taken against the large polluters that enjoyed the status of customers and investors of Gulf Coast." Petitioners' counsel examined Texas Water Commission employees at length about non-enforcement against some companies and about differences in levels of enforcement -- i.e., was enforcement by a mere notice of violation, or by an administrative proceeding, or by lawsuit? -- as between some companies and petitioners. *See, e.g.*, SF at 278-317, 372, 374-77, 1035, 1103-05, 1114-15, 1123-25, 1143, 1176, 1180-81, 1207-08. Four of the so-called large polluters listed on the chart in the Petition at page 5 -- Amoco, Arco, Hill Petroleum, and Union Carbide -- had been identified in trial testimony as customers of the Gulf Coast Waste Disposal Authority. Any otherwise proper argument in summation based on that status could have been made by petitioners' trial counsel.